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No. 04-844

Supreme Court, U.S.
FILED
JAN 21 2005
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF NEW MEXICO,

Petitioner,

vs.

TRACY JOHNSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW MEXICO SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Submitted By:

John A. McCall
405 D Cornell SE
Albuquerque, NM 87106
(505) 256-1998

*Counsel for Respondent**

*Admission to this court pending application sent January 19, 2005

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JURISDICTION

The Respondent opposes jurisdiction pursuant to 28 USC 1257(a) because no substantial federal question has been raised by the Petition. *Reich v. Freeport*, 388 F. Supp. 953, 955 (N.D. Ill. 1974). The issue raised by the Petitioner was also not raised by the State in this case on direct appeal. *Hanson v Denckla*, 357 US 235 (1958). Furthermore, issues involving the violation of individual rights should take priority over issues involving the protection of individual rights by a State:

> Because a state ground can only support a judgment *consistent* with a federal claim, the Court's jurisdictional presumption operates to expand this Court's review of state remedies that overcompensate for violations of federal constitutional rights. Historically, however, such cases have been outside the province of this Court. For well over a century the Judiciary Act of 1789 denied this Court authority to review state-court judgments upholding federal claims. By conferring no power to review these judgments, "the first Congress assembled under the Constitution" -- whose Members had "taken part in framing that instrument," in addition to having enacted the First Judiciary Act -- codified their conviction that this Court's overriding concern was to ensure that state courts respect federal rights.

Delaware v. Van Arsdall, 475 U.S. 673, 694-95 (1986) (Stevens, J. Dissenting) (citations ommitted). This Court will also generally not decide an issue on a federal question if there is some other basis supporting the State court's decision. In this case, the New Mexico Supreme Court decided the case in accordance with the law and the Constitution.

STATEMENT OF THE CASE

OVERVIEW

This Statement is to cure any omissions or errors in the State's Petition. The witnesses in this case testified that the Defendant, Tracy Johnson, co-defendants Coley Ingram and Jamal Young, and witnesses Jeff Hoff and Wayne Ingram, all came together on December 13, 2000 to

"party" after Jamal Young received his paycheck. They went to the liquor store in Defendant's car and bought liquor. They also obtained and used powdered cocaine from Anthony Granado upon visiting his home during the evening. They left the Granado home and returned later in the early morning hours of December 14 to obtain more powdered cocaine. During this visit, Coley Ingram and Defendant Tracy Johnson were witnessed entering the bathroom to have a discussion. The testimony and statements of Jeff Hoff conflict as to whether the two agreed to rob Granado and Ronnie Lujan or whether Johnson disagreed with Ingram about the proposal. Thereafter, the State alleges Defendant and Ingram confronted Granado and Lujan in Granado's bedroom with a tire tool and a pistol and demanded all the cocaine in the house. Defendant Johnson presented evidence that Coley Ingram, a large and aggressive man, confronted the two victims and that he did not participate. Jamal Young gave two conflicting statements, one stating that Defendant Johnson participated in the robbery and murder and one stating that he did not participate in the robbery and murder. Jamal Young took certain items from the house including an assault rifle, a Sega Dreamcaster and a stereo around the time Lujan and Granado were being beaten and murdered.

After the incident the group of young men left the house in Johnson's car with the exception of Coley Ingram who lingered at the scene outside the victims' home. There was conflicting testimony from witness Jeff Hoff regarding statements made by Defendant Johnson that he was involved in the murder. At one point Hoff testified he was not sure if Johnson said anything about being involved. Johnson testified denying any statement regarding his involvement. The group went to Johnson's Uncle's home for a few hours, then Johnson and Young to a remote location called the Flumes where Defendant testified his car became stuck and

Jamal Young unloaded the stolen goods. Neither the murder weapon or any other items involved in the crime were ever found.

TESTIMONY PRESENTED

1) Hearings on Motions in Limine

There was a hearing on October 31, 2000 on the Motions in Limine filed in the case. During that hearing the attorney for Jamal Young, Jess Cosby, presented his objections to a statement and letter from Young that the Defendant's private investigator had obtained on June 26, 2001 and then presented to Gary Mitchell, counsel for the Defendant. Young's statement and letter denied that Johnson had participated in the robbery and murder of Grandado and Lujan and explained that Young had been coerced to implicate Defendant Johnson by the murderer, Coley Ingram. The district court decided not to allow the letter and the statement in evidence because they were obtained by the Defendant's investigator acting under color of state law (without Defense attorney Mitchell's knowledge) and thus they were suppressed. The State Supreme Court did not discuss this issue, which was argued by Counsel for the State Attorney General's Office on appeal as a decision that was "right for the wrong reason."

During the aforementioned hearing on Limine, police detectives McGuire and McGilvray testified regarding the circumstances of the statement they took from co-defendant, Jamal Young. Neither of the Detectives indicated to Jamal that they believed he was the murderer. He was released after he was first picked up for interview. Defendant Tracy Johnson was arrested and held for two weeks before the other co-defendants were arrested. Detective McGuire indicated that Young said his memory of the incident was fuzzy from drugs and alcohol. Young had given an additional statement the morning of the murders and a video statement in Carlsbad the same

day. These additional statements were not addressed on appeal or admitted in evidence at trial.

David Pfeffer, the private investigator contracted by the New Mexico Public Defender Department, testified regarding the statement he took from co-defendant Jamal Young on June 26, 2001. Mr. Pfeffer testified that he was contacted by Mr. Mitchell about the investigation of Tracy Johnson's case, they spoke briefly and then he proceeded to investigate on his own. On June 26, Tracy Johnson gave him a printed letter from Jamal Young. Pfeffer requested an interview with Jamal Young and the two, after conversing over the jail's phone system, were provided with a library room where the interview could be taped. The interview was tape recorded and transcribed. Gary Mitchell, counsel for Tracy Johnson, was not contacted regarding this interview. Mr. Pfeffer explained that he knew Jamal Young had an attorney, however, he knew, as a former police officer, that he would have been allowed to speak to Jamal Young if Mr. Young volunteered to give a statement without his attorney.

Mr. Pfeffer also explained that he believed he did not have a duty to notify Jamal Young's counsel about the interview he performed. He testified that he allowed Jamal Young to give his side of the story of what happened the night of the murders. Jamal Young told Mr. Pfeffer that Coley Ingram had confessed being the "shooter" to Patrick Renfroe. He also told Pfeffer that Ingram had terrorized Young's family and made threats to Young implicating his mother.

Jamal Young took the stand to testify regarding the statement he gave to Mr. Pfeffer. Mr. Young testified that he had written the printed letter to Tracy Johnson that was at issue in the State's Motion in Limine. Mr. Young also testified that his statement in the interview, on tape with Mr. Pfeffer, was not the truth. He also testified that the letter he wrote was not the truth. He did not know why he did not tell the truth in either instance.

On cross examination by counsel for Tracy Johnson, Mr. Young admitted that everything written in the letter was written by him. He also admitted that he was not threatened or forced to give the interview with Mr. Pfeffer. Mr. Young then testified that half of the letter was true and half of it was false. Mr. Mitchell was not allowed to question Mr. Young about which parts of the letter were true, due to an objection by Mr. Cosby that was sustained by the Court. Mr. Young also testified that he did not tell his lawyer about the interview. Mr. Young testified that he did not think that he had committed "some kind of murder" when he spoke with Mr. Pfeffer. The trial court suppressed the aforementioned statements because they were taken by the public defender's investigator under color of state law. This issue was raised on appeal and was not decided by the New Mexico Supreme Court. The State argued the trial court was "right for the wrong reason" in suppressing this evidence.

2) *Trial Testimony*

The State's case began with Alicia Galindo, Ronnie Lujan's mother, who explained that Anthony Granado was living at Ronnie Lujan's apartment at the time of the shooting. Lawrence Granado, Anthony's brother, testified that he discovered the bodies of his brother and Ronnie Lujan late in the morning of December 14, 2001. He also testified that his brother had a MAK 90 assault rifle, a shotgun, a 30-30 and a 22 Long Rifle in his possession. He also testified that Anthony had recently purchased a Dreamcast.

Jeff Hoff

Twenty-three year old Jeff Hoff testified that he was a long term friend of Tracy Johnson's and that he was even closer with Jamal Young. He also knew Coley and Wayne Ingram as friends of Jamal and Tracy. Mr. Hoff admitted on cross that he was drinking two forty ounce beers and

part of a fifth of alcohol every day at the time of the incident. He was also smoking marijuana regularly at the time of the incident. He testified that he joined four of his friends late in the afternoon of December 13 and sat in the car while Tracy drove. The group went to the Hub liquor store and he witnessed Jamal, Coley and Tracy get into a fight with some other people.

Mr. Hoff was asked if he went over to Anthony Granado's house and he described Coley purchasing powder cocaine there that was consumed by himself, Tracy, Jamal, Coley, Anthony and possible Ronnie Lujan. Mr. Hoff then left the house with Tracy, Jamal and Coley and went to Defendant Johnson's house where they encountered Bobby Johnson, the Defendant's father. Mr. Hoff testified that they went back to Anthony Granado's home and they all got out of the car and knocked on the door because Coley wanted to purchase some more cocaine. They went to the back bedroom again and had some more powdered cocaine as a group with Mr. Lujan and Mr. Granado. This apparently occurred early in the morning of December 14, 2001.

Mr. Hoff testified that after the group snorted the cocaine, Tracy Johnson and Coley left the room and went into the bathroom, then he followed into the hallway outside the bathroom to see what they were doing. He opened the door of the bathroom, walked in and Tracy told him "to get out that they were handling business." On cross he admitted that he had originally told the police ". . . they tell me to get out cause that they're talking business." On re-direct he asserted that Tracy had said this. He had not heard anything prior to going into the bathroom, however, he heard arguing when he left the bathroom, maybe like anger, then he went into the hall. On cross examination he affirmed that he told the police four days after the incident that it sounded like "one person didn't want to do it and one person did."

Mr. Hoff testified that when they returned to the bedroom Mr. Johnson said "we're going to

jack them" and then Coley Ingram pulled a "tire tool type thing" from his pants and asked Mr. Hoff if he was "in or out." On cross examination, Mr. Hoff admitted he had told the police that Coley Ingram had said "we're going to jack y'all, you know, give us your sh__." On cross he also attempted to explain how Coley Ingram could have a four prong tire tool in his pants. Mr. Hoff testified he did not want any part of this and walked out the doorway, down the hall and out of the house. Coley closed the door with Jamal, Coley, Defendant Johnson, Anthony Granado and Ronnie Lujan in the room. Mr. Hoff admitted on cross examination that he never saw Defendant Johnson with a gun in his hand, with any stolen property or with any blood on him. Mr. Hoff went to the car out front and a few minutes later Jamal Young came to the car with an assault rifle. A couple minutes later Young came back to the car with either a dreamcast or a stereo. Young made another trip into the house and returned with another item. After this, Young went back into the house and Mr. Hoff heard five gunshots. A few seconds later, Coley Ingram, Jamal Young and Defendant Johnson allegedly walked out of the house. Defendant and Mr. Young came back to the car while Coley Ingram waited at the door. Defendant told Coley to come get in the car or they would leave him, however, Coley did not come back to the car and Johnson drove off.

On the way back to Defendant Johnson's house, Mr. Hoff testified that he asked, "did you smoke them?" Hoff asserted that Johnson answered "yeah." On cross he admitted to telling the police that he had asked Johnson "did *ya'll* smoke them?" On re-direct he stated he was not sure what he said. He also alleged that Johnson kept saying that he was a "G." This apparently meant a gangster. On cross he admitted that he never told the police about this alleged statement when he gave them his statement. When they arrived at the Johnson home, Hoff observed Bobby

Johnson and Wayne Ingram there. Mr. Hoff called his father, however, Tracy Johnson told him to hang up the phone and walk home before Hoff said anything to his father. Johnson then instructed Wayne Ingram to watch Hoff so he would not go to the police. Then Defendant Johnson and Jamal Young left. Hoff was not prosecuted for felony murder.

Detective Stacey McGuire and Young's Statement

Detective McGuire testified he is a felony crimes detective in Carlsbad, New Mexico. His testimony was used to introduce an interview he conducted with co-defendant Jamal Young on December 31, 2000 while Mr. Young was under arrest. The tape of the interview was admitted as evidence pursuant to the granting of the State's Motion in Limine, played, in part, to the jury and is transcribed in the transcript of this matter.

Mr. Young was read his rights, and questioned regarding the incidents of December 13 and 14. Coley Ingram's mother cashed Jamal's paycheck, then the boys might have picked up Jeff Hoff on Canal Street or at Fifth Street Park and went to the Hub to buy two bottles of E and J Brandy. While at the Hub they got into a fight apparently instigated by Coley Ingram. They went cruising around and returned to Tracy's house. They drank, played dominoes, and then they left Tracy's and went to Anthony Granado's. Jamal stated that he went to Anthony Granado's house a second time with Tracy, Coley and Jeff Hoff. He said that they were "in the room" and Coley and Tracy left, then they came back and said "this is a jack move." According to Young's statement, ". . . once he said that I didn't know what to do. I didn't know nothing about it." Jamal Young's statement goes on to posit that he believes Coley might have said "are you in our out?"

Young's statement continues with him describing how he got the stereo and the dreamcast

and took them to Jeff. Ronnie Lujan got up and Young states that he hit him and he fell on the floor and started "praying or something." Young asserted that he hit Lujan very hard and he gave him a black eye. Young also stated that he went back in the house or the room after he heard a gunshot, he saw the two victims laying on the ground, and questioned what was happening. He said, "Tracy had the crowbar and Coley had the gun at the time, or Tracy had the gun and Coley - I don't know : . ." After Mr. Young walked in and saw the bodies, "they were like let's go, let's go, let's go. . . . When we all went to the car Coley stayed there. I know he stayed because we were arguing and he said "I'm gonna stay." Subsequent to leaving the house, Tracy drove Jamal and Jeff back to his house where they encountered Wayne Ingram. Then Tracy and Jamal left to go to a place referred to as "the Flumes" where Tracy's father's car got stuck and they had to work to get the car unstuck. Mr. Young stated that they smoked a marijuana cigarette and then went to Tracy Johnson's Uncle's home.

Young could not remember seeing an "AK47 assault rifle" or any gun in the vehicle and denied ever seeing one. He also stated that he could not remember what happened to the items taken from Lujan and Granado. Finally, he could not remember who had the gun and who had the alleged tire tool. He opined that he saw both Tracy and Coley holding the tire iron. He clarified that Coley had the tire iron and Tracy had the gun "and that's when they let them know (Lujan and Granado) that they were going to get jacked." Mr. Young then stated that Coley started it and said "we're gonna jack you up." Mr. Young also stated that Coley was carrying the gun at that time. Detective McGilvray then interjected that Coley was carrying a tire iron that looked like a "T" and Jamal also agreed with this statement. Later he stated the tire iron looked like a "T" but he didn't know what happened.

Mr. Young stated that when he took the stereo, Anthony Granado looked at him and was saying "you can take everything, just take everything, I ain't gonna say nothing." The next time he came back to the room Defendant Johnson and Coley Ingram had switched weapons and Johnson had the tire iron. At this point in his statement, Young again noted that he hit Ronnie Lujan. He left the room, then he heard the shots, went to the bathroom and then into the room where he saw Johnson and Coley Ingram grabbing items, including a large black case that Coley had with him. Young admitted he probably had blood on him from the victims. When prodded he also indicated that there was an argument over the assault rifle, however, he did not remember taking it. Young did not admit to hitting the victims with a gun. He did say that Coley hit them with something.

A portion of Detective McGuire's interview was not included in the evidence presented to the jury. On cross-examination Detective McGuire affirmed that Jamal Young was drunk and using drugs at the time of the incident and his memory was fuzzy.

Wayne Ingram

Wayne Ingram, co-defendant Coley Ingram's brother, was next called to testify as an eyewitness to the events of December 13 and 14, 2000. Wayne was dropped off at Defendant Johnson's house early in the day of December 13. He did not remember how he got there. They left Tracy's house in a yellow Caprice or Impala owned by Tracy's dad. At some point they went to see Anthony Granado the first time.

The group, including Jeff Hoff, went to the Hub Liquor Store after this and an altercation broke out, at which time Wayne left the area. He went around to the front of the Hub and saw Anthony Granado and Paige purchasing liquor. Wayne left the Hub with Anthony and Paige to

go to Anthony's house. Wayne used Anthony's cell phone to try and call Tracy Johnson's house from Anthony's house. Wayne was getting ready to go back to Tracy Johnson's when Anthony's roommate, Ronnie Lujan, came home. Anthony and a girl named Christina took Wayne to Tracy Johnson's home. At Tracy's home Anthony "went in and said hi to everybody" and then he left. When Anthony was at Tracy's house Jamal, Coley, Jeff Hoff and the Defendant were there. After 30 to 45 minutes, Wayne got a ride with Patrick Renfro to get his clothes so he could come back to Tracy's home and spend the night there. He returned to Tracy's house 30 to 45 minutes later and, when he arrived, Bobby Johnson, Tracy's father, was the only person there.

Late in the night Wayne Ingram received a call from Tracy Johnson and Coley Ingram in which "[t]here was a gun involved in the situation," but he could not remember much about it. When cross-examined Mr. Ingram stated that he only mentioned that phone conversation in his July 12, 2001 statement after he knew his brother was in trouble and that he had never mentioned the call in two December, 2000 statements and his February 6, 2001 statement. Wayne was referred to a transcript of a statement he gave to the police on July 12th, 2000 and asked if he remembered stating, "About 2:00 that evening I got a phone call from Tracy asking me if I had a pistol. Do I know where he could get a gun. I told him no, and he said okay. When pressed as to the accuracy of that statement Wayne responded that he did not really know who had asked about a gun. He stated that he was "stressed out" from the questioning of the police when he was asked about the call in his police interrogation. On cross he stated that his testimony under oath was that he did not remember who had asked him about a gun.

Wayne went to sleep in Tracy's room that night, was awakened around 4:00 or 5:00 in the morning by voices and then Tracy and Jamal came into the room. He did not see Tracy with a

gun or tire-arm when he entered the room. Tracy and Jamal told Wayne "to keep an eye on Hoff," and Wayne decided to leave with Jeff Hoff. He explained on cross exam that he was to watch Hoff because of "an argument, fight or whatever." Tracy and Jamal also left the house.

Tracy Johnson

Tracy Johnson testified in his case in chief after the State rested. Around 7:00 on December 13, 2000, Tracy, Jamal, Coley, Jeff Hoff and Wayne Ingram went to Anthony Granado's house to buy cocaine and see Anthony and Rodney Gonzales. The group went back to Anthony's room and did lines of cocaine and Coley Ingram bought $50.00 worth of crack cocaine. Defendant Johnson testified that the meeting was cordial and that he had known Anthony Granado for some time, however, he did not know Ronnie Lujan. The group went back to Tracy's home and drank and played dominoes. Coley Ingram wanted to go back to Anthony and Ronnie's to obtain more cocaine. All of the young men drank from four fifths of E and J Brandy that evening. Coley drove to the liquor store when the group went back to get more liquor and that was when the fight broke out there. Coley was described as a very good fighter who was short tempered. He was bigger than Johnson and the victims and testimony revealed a very aggressive personality.

The group went to Anthony's house the second time around 4:00 or 4:30 a.m. after Coley Ingram called Tracy's house and talked to his brother, Wayne. In Anthony's room, Ronnie Lujan entered and offered a line of cocaine which each consumed, then Tracy and Coley went to the bathroom and Coley asked Tracy how much money he had. Coley then suggested that they take the cocaine and Tracy objected. Coley then walked out of the bathroom in front of Tracy and broke the hall light as he walked past it. Coley went into the room first, said "this is a jack." and

pulled a gun. He asked Jeff Hoff, "are you in our out?" And Hoff said, "I'm out." Coley told Jamal, "find the dope." Coley put the gun in his pants threw a tool box at the two and then took a tool from the tool box and hit Anthony with it. Jamal Young left the room with drugs and then returned. Coley continued to inquire as to the location of more drugs and Jamal beat Ronnie Lujan. Coley continued to hit Anthony and ask him where the rest of the drugs were located.

Tracy observed that Coley started shooting Ronnie Lujan so he ran out of the house. Tracy told Coley something to the effect of "you don't need that fu----ing gun." Tracy also told Coley to put the gun away and stated that he (Tracy) never had possession of the gun or the tire iron. Tracy came out of the house and jumped in his car as did Jamal. Coley came out of the house and Tracy told him if he did not get in the car he would leave him. Coley said he wanted to stay and clean up the blood. As they drove back to Tracy's father's house Jeff Hoff asked what happened and Tracy told him that Coley had "shot them fools." Tracy told Wayne Ingram he had to go with Jeff Hoff because he couldn't stay at Tracy's house and Jeff was calling his mother. Tracy then took Jamal to the "Flume" area and Jamal took the stolen items out of the car. Tracy Johnson denied helping rob or murder the victims in any way and stated that he told Coley Ingram not to do it.

ARGUMENT IN OPPOSITION TO GRANTING THE PETITION

INTRODUCTION

The gist of the argument presented by the State and the dissent is that, when confronted with harmless error review, the reviewing court should make inferences regarding circumstantial evidence that the jury never had the opportunity to make. The Petitioner's view is that when direct evidence is excluded on harmless error, circumstantial evidence that remains is almost

always sufficient to determine that a jury could find guilt beyond a reasonable doubt on each of the elements necessary to convict the Defendant of a crime. This view attempts to conform the harmless error analysis into a sufficiency of the evidence analysis with the improper evidence removed from the case. *See State v. Johnson*, ___ N.M. __, 98 P.3d 998, 1010 (2004). Such a view bears no regard for the effect a constitutional error has on the jury process and the corruption for which the error is responsible. *Neder v. United States*, 527 U.S. 1, 19 (1999) (we examine the record for "evidence that could rationally lead" to a verdict of not guilty.); *Delaware v. Van Arsdall*, 475 U.S. 673, 686 (1986) ("The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt.")

The New Mexico Supreme Court, adhering to *Chapman* and *Van Arsdall* has set out the basis for applying the harmless error factors in *Van Arsdall*. It has not established a new theory designed to denigrate or make irrelevant overwhelming evidence of guilt, rather it has explained when overwhelming evidence of guilt makes an error harmless.

The State's Petition does not mention that Defendant Tracy Johnson asserted several issues as error on appeal that are relevant to understanding the nature of this case. He raised the issue of the introduction of Jamal Young's *ex parte* statement as a violation of his sixth amendment rights. He also asserted the trial court erred in refusing to admit Young's statement to Defendant's investigator as rebuttal to Young's prior statement (the one improperly admitted). Other issues raised included the failure of the trial court to give a limiting instruction with respect to Young's statement, insufficient evidence on all counts and, whether the jury instruction on aiding and abetting was overly broad, failed to define aiding and abetting and failed to require

proof beyond a reasonable doubt. Finally, Johnson argued that the trial court erred in striking several jurors over objection because the rationale for striking them was their answer to a hypothetical question regarding aiding and abetting.

The State conceded the Robbery conviction was improper in its Answer Brief in the New Mexico Supreme Court because the Armed Robbery merged with the Felony Murder charge. That issue should no longer be at issue in this case.

ARGUMENT

The State argues that the New Mexico Supreme Court decided this case contrary to *Chapman v. California*, 386 U.S. 18 (1967) and *Delaware v. Van Arsdall*, 475 U.S. 673 (1986). The State mistakenly argues that the New Mexico Supreme Court now requires a reviewing court to weigh the effect of "cumulative or corroborative evidence" on other properly admitted evidence to determine the degree to which that evidence corroborated other similar evidence of defendant's guilt. Petition at 6 *citing Johnson*, at 1008. The New Mexico Supreme Court, in the case at bar, applied the *Van Arsdall* factors to determine harmless error and clarified the difference between corroborative evidence and cumulative evidence noting that "corroborative evidence tends to corroborate or confirm, whereas cumulative evidence merely augments or tends to establish a point *already proved* by other evidence." *Id.* at 1008, *citing State v. Kennedy*, 592 P.2d 1288, 1292 (Ariz. Ct. App. 1979) (emphasis in original); *see also Fahy v. Connecticut*, 375 U.S. 85, 86 (1963) (question of harmless error is not simply whether there is other legally "sufficient evidence [of guilt] on which the accused could have been convicted without the evidence complained of."); *Kotteakos v. United States*, 328 U.S. 750, 764-65, 776 (1946); *Washington v. Smith*, 219 F.3d 620, 634 (7th Cir. 2000); *State v. Bass*, 198 Ariz. 571, 581, 12

P.3d 796, 806 ("Evidence is cumulative, and therefore error is cured only where the tainted evidence supports a fact otherwise established by existing evidence."); Black's Law Dictionary 577 (7th ed. 1999). This distinction was made by the New Mexico Supreme Court to clarify when the second *Van Arsdall* factor, the cumulative nature of the evidence, is applicable to the question of harmless error. It must be determined whether the improperly admitted evidence was so unimportant and insignificant that its corroborative effect upon other evidence of guilt was negligible. *Johnson* at 1009, *citing Chapman* 386 U.S. at 22. This distinction is borne out in the case at bar because, as the New Mexico Supreme Court noted, Jamal Young's improperly admitted statement was the key evidence on the key elements of the crimes charged against Defendant Johnson. *Johnson* at 1010. The State's closing argument is unequivocal on this point: "The key importance is the statement that was made by Jamal[l] Young against him. Not only does this statement corroborate everything that Hoff tells you, but it implicates Defendant in everything they did." *See Chapman* 386 U.S. at 25; *Zappulla v. New York*, 389 F.3d 351, 359-60 (2nd Cir. 2004); *United States v. Joe*, 8 F.3d 1488, 1497 (10th Cir.1993) (reliance on constitutional error in closing is support for finding a lack of harmless error).

The evidence examined by the New Mexico Supreme Court revolved in part around the determination of motive to commit or aid in armed robbery, the basis for felony murder, and this evidence must be parsed carefully when the only remaining evidence, sans the improperly admitted statement, is circumstantial. *Johnson* at 1008-09; *See Zappulla v. New York*, 389 F.3d 351, 360-61 (2nd Cir. 2004). The determination of harmless error is normally made in light of certain "subjective" determinations. For example if the Defendant had been able to cross examine Young, would he have achieved an admission from Young that his subsequent statement to

Defendant's investigator was true as to the crucial pieces of evidence demonstrating the Defendant did not participate in the crimes or have the necessary intent? *Olden v. Kentucky*, 488 U.S. 227, 232-33 (1988); *Van Arsdall* at 684.

The State complains that the New Mexico Supreme Court has created a standard that permits the reviewing court to "parse the record" to determine if a jury would have convicted an accused without the inadmissible evidence." Petition at 7. This assertion, as to the creation of a new standard, is not borne out by the *Johnson* opinion. The New Mexico Supreme Court clearly delineated the second and third *Van Arsdall* factors governing cumulative and corroborative evidence and this delineation does not change the harmless error analysis, it follows it. The *Johnson* Opinion clarifies: "To the extent the evidence corroborates and therefore strengthens, the prosecution's evidence, it cannot be deemed "cumulative" as we understand that term." *Johnson* at 1008. In this case the instances in which the prosecutor's closing referred to Young's statement to support Hoff's testimony are myriad.

Van Arsdall would have no meaning if the State's theory were followed because the first factor instructs the reviewing court to evaluate "the importance of the witness testimony in the prosecution's case." the third *Van Arsdall* factor instructs the reviewing court to evaluate "the presence or absence of evidence corroborating or contradicting the testimony of the witness; and the fifth factor requires evaluation of "the overall strength of the prosecution's case." *Van Arsdall* 475 U.S. at 684; *Zappulla v. New York*, 389 F.3d 351, 356-57 (2nd Cir. 2004) (evaluating evidence just like the defective evidence from Hoff in the case at bar and finding the prosecution's case "weak" such that it had not shown harmless error beyond a reasonable doubt). The State does not explain how these evaluations can be made by the reviewing court without determining

the overall strength of the evidence left in the State's case. This evaluation can be semantically termed as subjective or objective, depending on the implication an observer wishes to make.

When the State affirms the improperly admitted evidence is "key" to the jury's understanding of Its theory of the case, the reviewing court generally cannot make a finding of harmless error without stretching beyond the bounds of *Chapman*. *See Satterwhite v. Texas*, 486 U.S. 249, 260 (1988). When the State's only other eyewitness (Hoff) contradicts himself on every single bit of testimony that would be used to find the Defendant guilty beyond a reasonable doubt on each element of the crimes without the inadmissible evidence, the reviewing court cannot make a determination that the prosecution has a "strong" case or that there is no evidence contradicting the testimony of the witness. The New Mexico Supreme Court's distinction between cumulative and corroborative evidence merely underscores this problem with the State's "weak" case and this explains why a sufficiency of the evidence review is inapplicable. The State asks this Court to review the testimony of Defendant Johnson and the testimony of Jeff Hoff and make a determination that a jury would have believed Hoff over Johnson without the corroborating effect of Young's statement which was not subject to cross examination or rebuttal. This would turn the requirement that the reviewing court find the constitutional error was harmless beyond a reasonable doubt on its head. *Neder v. United States*, 527 U.S. 1 (1999) ("the test for determining whether a constitutional error is harmless. . . . is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. . . .'") Reliance on *Neder* does not support the State's case as *Neder* is also distinguishable from the case at bar wherein the Defendant has his testimony, Hoff's conflicting testimony and conflicting prior statements to police and Young's subsequent statement to Defendant's investigator all supporting

the Defendant and the New Mexico Supreme Court's opinion. *Compare Johnson* at 1004, 1009, *with Neder* at 19 ("In a case such as this one, where a defendant did not, and apparently could not, bring forth facts contesting the omitted element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee.")

The New Mexico Supreme Court did not create a new standard in this case. Prior federal case law firmly supports the Court's evaluation of harmless error, particularly when the State relies on the error as the key element of Its argument to the jury. *Arizona v. Fulminante*, 499 U.S. 279, 297-98 (1990); *United States v. Joe*, 8 F.3d 1488, 1497 (10th Cir.1993) (reliance on constitutional error in closing supports finding a lack of harmless error); *See also Chapman* at 24-25 (the prosecution's repeated references at closing were the basis of the Court's finding error was not harmless); *C.f. Johnson* ___ N.M. ___ 98 P.3d at 1010 (The State's reliance on "Young's overwhelmingly inculpatory statement militates in favor of a new trial. . . ." and "we cannot conclude beyond a reasonable doubt that this evidence . . . was of so little consequence that it did not contribute to the verdict).

The Petitioner and the dissenting justice in this case attempted to craft a "cold case" out of thin air to support their theory. They postulate that the Defendant's guilt was established beyond a reasonable doubt because he was in the room when the crime occurred. *Id.* at 1014 (Serna, J. Dissenting) ("The State did not have to prove that Defendant shot the gun, held the gun, or even wielded the tire iron in order for the jury to find that Defendant helped, encouraged, or caused the crime to be committed."); Petition at 13-14. However, the State conceded this case was a "close call on harmless error" when arguing the case before the State Supreme Court and this

acknowledgment that the State's remaining case was weak reinforces the New Mexico Supreme Court's opinion, making the very point the State seeks to now unravel by collaterally attacking the way the *Johnson* court reached this conclusion under *Van Arsdall*. *Johnson* at 1007. One primary reason is that Hoff's testimony was conflicting and, given the *Van Arsdall* factors, Hoff's testimony was not sufficiently corroborative, thus making for a "weak" case. There is a reasonable probability that Young's statement might have contributed to the conviction given the other limited, direct, non-conflicting evidence of Johnson's mere presence when the crime was committed. *Chapman* at 23.

The State and the dissent do not parse the evidence to identify what evidence was cumulative, what was corroborative, what was conflicting, what was "close" or "weak" and what then remained without the improperly admitted statement. If this *Van Arsdall* process is carefully pursued it reveals that the Defendant was not seen with a weapon in his hand, the murderer (Coley Ingram) carried a four prong tire iron tucked in his pants for several hours that evening (according to Hoff), the Defendant was never seen taking items from the room, he was never seen to strike a victim, he argued with the acknowledged perpetrator prior to the commission of the crime (Hoff's statement to the police is indisputable on this point), he argued with the perpetrator after the crime and left him at the scene, he had no blood on him whereas the perpetrator did have blood on him (according to Hoff), and there was no eye-witness presented to contradict his assertion that he tried to stop the murderer.

Van Arsdall instructs that when there is evidence conflicting with the witness's improperly admitted statement the court must evaluate that evidence along with the strength of the State's case. Hoff was such a weak witness that finding a jury could convict on his conflicting testimony

and statements would be the same as saying that the average jury that flipped a coin to determine the truth would be entitled to deference in its decision under *Van Arsdall*. As previously noted, the State admitted this case was close a case and that fact among the host of *Van Arsdall* factors considered by the New Mexico Supreme Court weighs against a finding of harmless error). *See Kyles v. Whitley*, 514 U.S. 419, 454 (1995) ("This is not the 'massive' case envisioned by the dissent . . . it is a significantly weaker case than the one heard by the first jury . . ."). Now the State attempts to circumvent all of the *Van Arsdall* factors in Its Petition by alleging the New Mexico Supreme Court created a new standard when It distinguished between cumulative and corroborative evidence. Petition at 6; *Van Arsdall* at 695 (Justice Marshall dissenting) ("Thus, although this Court now has the power to review decisions defending federal constitutional rights, the claim of these cases on our docket is secondary to the need to scrutinize judgments disparaging those rights.") *citing* J. Choper, Judicial Review and the National Political Process 2 (1980); *See e.g. Ashwander* v. *TVA*, 297 U.S. 288, 346-347 (1936) (Justice Brandeis concurring) (". . . The Court will not pass upon a [federal] constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.")

The New Mexico Supreme Court's finding that cumulative evidence is much different from corroborative evidence does not create a new standard. *Van Arsdall* at 686-87; *Harrington v. California*, 395 U.S. 250, 254 (1969) (witness placed gun in the Defendant's hand in the store when the robbery was being committed, multiple eye witnesses corroborated details of the robbery, suppressed confessions were cumulative.) As the court in *Harrington* made clear:

We do not suggest that, if evidence bearing on all the ingredients of the crime is

> tendered, the use of cumulative evidence, though tainted, is harmless error. Our decision is based on the evidence in this record. The case against Harrington was not woven from circumstantial evidence. It is so overwhelming that unless we say that no violation of *Bruton* can constitute harmless error, we must leave this state conviction undisturbed.

Id. at 288. This Court in *Schneble* also found that the admission of inadmissible statements of a co-defendant was harmless error because the Defendant had confessed to the murder in grisly detail. *Schneble v. Florida*, 405 U.S. 427, 430-31 (1972). None of the cases cited by the Petitioner prohibits a reviewing court from analyzing cumulative and corroborative evidence in light of other conflicting evidence and the strength of the State's case to determine if there was a reasonable possibility that the evidence had an impact on the jury's verdict of guilty.

The Petitioner also relies on other cases in which state courts acknowledged the harmless error standard and application of the *Van Arsdall* factors. Petition at 11-12. Apparently the State is attempting to demonstrate that the court's do not subjectively scrutinize the effect of the evidence presented to the jury in an harmless error analysis. This assertion is preposterous. For example, *Hanson v. State*, 84 P.3d 320, 330 (Wyo. 2004) cites *Van Arsdall* stating: "it is plain to us that '[a] reasonable jury might have received a significantly different impression of [the witness'] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination.'" *Hanson* at 330 *citing Van Arsdall*, 475 U.S. at 680. Speculation on how the evidence would affect a reasonable jury is simply subjective evaluation no matter how it is phrased. *See Id. quoting Davis v. Alaska*, 415 U.S. 308, 317-18 (1974) ("We cannot speculate . . . whether the jury . . . would have accepted this line of reasoning had counsel been permitted to fully present it. . . . On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of

attack on the credibility of an apparently blameless witness . . .''). This analysis appears to assert that the reviewing court cannot speculate on the impact of hypothetical evidence, but the reviewing court does speculate on the impact hypothetical evidence might have on the case presented to the jury. The Wyoming Court also relied on Tenth Circuit precedent establishing harmless error when eye witness testimony is discredited. *See United States v. DeSoto*, 950 F.2d 626, 629-630 (10th Cir. 1991).

Likewise, *State v. Oscarson*, 845 A.2d 337, 348 (Vt. 2004) demonstrates a similar analysis of harmless error to that performed by the New Mexico Supreme Court at bar. The Vermont Supreme Court went further and found that un-conflicted corroborated testimony was insufficient to withstand harmless error review:

> Here, Jesse's testimony was simply too important to the State's case, and too graphic and disturbing to say it was ignored by the jury. Nor was it so fully corroborated or cumulative as to make the error meaningless. Therefore, we find that the erroneous admission of Jesse's testimony was harmful and, accordingly, reverse defendant's conviction for aggravated sexual assault on Jesse.

Id. at 349. The court then explains its harmless error review and discusses the "strength" of the State's case and the offending evidence delving into the very analysis the Petitioner states the prosecution has "never before . . . been required to show." *Id.*, Petition at 11. This discussion is, inherently, a subjective evaluation of the effect of the case on the jury:

> [W]e look to see if the strength of the offending evidence is mitigated by the third and fourth factors, that is, was the offending evidence corroborated on its material points or was it cumulative of properly introduced evidence? As we have already noted, Jesse's testimony was well corroborated by a wealth of circumstantial evidence indicating identical and simultaneous abuse of his brother Joey. But, on the material point of Jesse's testimony - that defendant touched his penis with her mouth - the corroborating evidence available to the jury was comparatively weak. Here, there was only Joey's affirmation that "I know it happened,"and circumstantial evidence of Jesse's precocious sexual knowledge - neither of which

> has the same persuasive power as Jesse's detailed and graphic descriptions of having oral sex forced upon him by his mother.
>
> . . . [B]ased on the court's instructions to the jury that it must find independent evidence of guilt of abuse of each child, we must assume that if the jury considered Joey's testimony about the abuse he suffered when deliberating on the charge for abuse of Jesse, that it did so only as corroborative evidence and not as cumulative evidence.

Id. at 351. In the case at bar, the detailed and graphic descriptions of Jamal Young were evaluated in the same manner as in *Oscarson*; following the *Van Arsdall* factors, comparing the improperly admitted direct evidence and the remaining circumstantial evidence, and seeking to evaluate whether the evidence was harmless beyond a reasonable doubt. In many ways, the cited portion of *Oscarson* demonstrates a stronger circumstantial case against the defendant than the case at bar. Certainly the Vermont Supreme Court found the prejudicial corroborative evidence was not "cumulative" just as the New Mexico Supreme Court instructs. *Johnson*, __ N.M. __, 98 P.3d at 1008.

The other cases cited by the State are not definitive regarding the evaluation of the strength of the cases and the corroborative and cumulative nature of the evidence. Petitioner's cite to *State v. Atkinson*, 276 Kan. 920, 930, 80 P.3d 1143, 1151 (2003) does not illuminate Its arguments. In that case the court found that restrictions on cross examination of a witness were improper because her "testimony and credibility were *key* to the overall strength of the prosecution's case." *Id.* (emphasis added). *Andrews v. State*, 344 Ark. 606, 617, 42 S.W.3d 484, 492 (2001), does not really address the issue as a case on point and merely quotes *Van Arsdall*. *State v. Welch*, 760 So. 2d 317, 321-22 (La. 2000), includes little analysis of *Van Arsdall* and how the factors are to be applied, merely noting that the remaining circumstantial evidence in the

case meant the court could not conclude that the conviction "was surely unattributable to the confrontation error." *Id.* at 322.

The dissent also argues, in *State v. Alvarez Lopez*, __ N.M. __, 98 P.3d 699, 718 (2004), that the majority approach in the case at bar and *Alvarez Lopez* is an "effect on the jury" approach. However, the perceived conflict is absolutely ephemeral. When a court reviews the "strength" of a case and the relative conflicting and corroborating evidence related to an impermissible statement under *Van Arsdall*, as is shown above, there is no real difference (when subjective terms like "strength" or "close" are used) in the evaluation of whether there was a reasonable probability the jury verdict would have been different or the improper evidence was harmless beyond a reasonable doubt. Very probative improper evidence in a close case (as determined by the court, not the jury (jury's do not render verdicts identifying cases as "close")) is, under most circumstances, not going to pass the harmlessness test regardless of the semantics applied.

The cases discussed in this Brief include cases where the Defendant testified, the circumstantial evidence was great and other factors were substantial or not. The reviewing courts still look to the evidence to see if there is a case remaining and they do not apply a sufficiency of the evidence test. What the New Mexico Supreme Court has done with the *Van Arsdall* factors is within its purview to apply the factors under federal law. *Alvarez-Lopez*, at 708 ("We believe 'the way we phrase the governing [harmless error] standard is far less important than the quality of the judgment with which it is applied.'") *citing Brecht v. Abrahamson*, 507 U.S. 619, 643 (1993) (Stevens, J., concurring).

The debate engendered over *Sullivan v. Louisiana*, 508 U.S. 275 (1993), *Neder* and

Chapman appears chimerical given the examples of how *Chapman* and *Van Arsdall* are put into practice. The keystone of all three cases is whether "the guilty verdict rendered in this trial was surely unattributable to the error." *Alvarez-Lopez* at 708 *quoting Sullivan* at 279. This Court has not "weighted" the *Van Arsdall* factors, state courts have in some cases, however, the focus on ensuring the Provence of the jury requires that a court examining the *Van Arsdall* factors not make a determination of guilt or innocence in the majority of occasions, but rather make a determination of whether the jury was able to get to its destination without the corrupting effects of improper evidence taking the helm of the decision making process. This Court, in *Neder*, articulated the parameter within which the New Mexico Supreme Court has operated in both *Johnson* and *Alvarez-Lopez*:

> Of course safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error -- for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding -- it should not find the error harmless.
>
> A reviewing court making this harmless-error inquiry does not, as Justice Traynor put it, "become in effect a second jury to determine whether the defendant is guilty." Rather a court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element. If the answer to that question is "no," holding the error harmless does not "reflect a denigration of the constitutional rights involved." *Rose*, 478 U.S. at 577. On the contrary, it "serves a very useful purpose insofar as [it] blocks setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." *Chapman*, 386 U.S. at 22.

Neder at 19 (Traynor citation omitted).

The State's Petition should be denied because the New Mexico Supreme Court has not changed the standard of harmless error. The New Mexico Supreme Court has articulated the way

in which the *Van Arsdall* factors should be applied in New Mexico courts: 1) the central focus of *Van Arsdall* is whether there is a reasonable probability the erroneous evidence might have affected the jury's verdict; and 2) distinctions must be made between cumulative and corroborative evidence, cumulative evidence that has little probative force is more likely harmless; 3) impermissible evidence that corroborates other key evidence in the case must be carefully examined for its corroborative effect on that evidence. *Johnson* ___ N.M. ___ 898 P.3d at 1004, 1008.

CONCLUSION

For the foregoing reasons Respondent Tracy Johnson requests this Honorable Court deny the State of New Mexico's Petition for Writ of Certiorari to review the judgment and opinion of the New Mexico Supreme Court.

Respectfully Submitted by:

John McCall
Attorney for Respondent Tracy Johnson*
405 D Cornell SE
Albuquerque, NM 87106
(505) 256-1998

January 2005

*Admission to this court pending
application sent January 19, 2005